

SERVICE DATE – FEBRUARY 19, 2004

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-290 (Sub-No. 222X)

NORFOLK SOUTHERN RAILWAY COMPANY–ABANDONMENT EXEMPTION–IN
MERCER COUNTY, WV, AND TAZEWELL COUNTY, VA

Decided: February 18, 2004

Norfolk Southern Railway Company (NSR) filed a notice of exemption under 49 CFR 1152 Subpart F–Exempt Abandonments to abandon a 1.9-mile line of railroad between milepost PO-0.0 at Bluestone, Mercer County, WV, and milepost PO-1.90 at Pocahontas, Tazewell County, VA. Notice of the exemption was served and published in the Federal Register on September 24, 2003 (68 FR 55297). The exemption became effective on October 24, 2003.¹

On February 6, 2004, Historic Pocahontas, Inc. (petitioner), late-filed a request for the issuance of a notice of interim trail use (NITU) for the line under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act),² and for a public use condition under 49 U.S.C. 10905,³ in order to

¹ By decision served October 22, 2003, the exemption was made subject to the condition that, if NSR revises its abandonment plans to include salvaging activities, NSR shall consult with the U.S. Fish and Wildlife Service-Gloucester (USFWS-Gloucester) to determine what sediment and erosion control measures should be implemented during salvaging activities, and NSR shall report the results of any USFWS-Gloucester consultations to the Board's Section of Environmental Analysis.

² The September 24, 2003 notice of exemption provided that requests for trail use/rail banking had to be filed by October 6, 2003, and that requests for public use conditions had to be filed by October 14, 2003. However, in Aban. and Discon. of R. Lines and Transp. Under 49 U.S.C. 10903, 1 S.T.B. 894 (1996) and 2 S.T.B. 311 (1997), the Board retained the policy of accepting filings after the due date when good cause is shown. Because there is no indication that petitioner's late-filed request will prejudice any party, it will be accepted. See Wheeling & Lake Erie Railway Company–Abandonment Exemption–in Starke County, OH, STB Docket No. AB-227 (Sub-No. 10X), slip op. at 1 n.1 (STB served Nov. 7, 1997).

³ An environmental assessment was served on September 30, 2003, indicating that the right-of-way may be suitable for other public use following abandonment.

negotiate with NSR for acquisition of the right-of-way for use as a recreational trail.⁴ Petitioner requests that NSR be prohibited from disposing of the corridor, other than the tracks, ties, and signal equipment, except for public use on reasonable terms, and that NSR be barred from removing or destroying any potential trail-related structures, such as bridges, trestles, culverts, and tunnels, for a 180-day period from the effective date of the abandonment exemption. Petitioner states that it needs this amount of time to begin negotiations with NSR.

By letter filed on February 13, 2004, NSR advised the Board that it has not consummated the abandonment and consents to the issuance of a NITU so that it and petitioner can negotiate and finalize an interim trail use agreement. Because petitioner's request complies with the requirements of 49 CFR 1152.29 and NSR is willing to negotiate for trail use, a NITU will be issued. The parties may negotiate an agreement during the 180-day period prescribed below. If the parties reach a mutually acceptable final agreement, no further Board action is necessary. If no agreement is reached within 180 days, NSR may fully abandon the line. See 49 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to restoration for railroad purposes.

As an alternative to interim trail use under the Trails Act, the right-of-way may be acquired for public use as a trail under 49 U.S.C. 10905. See Rail Abandonments—Use of Rights-of-Way As Trails, 2 I.C.C.2d 591, 609 (1986). To justify a public use condition, a party must set forth: (i) the condition sought; (ii) the public importance of the condition; (iii) the period of time for which the condition would be effective; and (iv) justification for the imposition of the period of time requested. See 49 CFR 1152.28(a)(2). Petitioner has satisfied these requirements and, therefore, a 180-day public use condition will be imposed commencing with the effective date of the abandonment exemption.

When the need for interim trail use/rail banking and public use is shown, it is the Board's policy to impose both conditions concurrently, subject to the execution of a trail use agreement. Here, however, while both conditions will be imposed at this time, the public use condition will expire on April 21, 2004,⁵ while the trail use negotiating period will run 180 days from the service date of this

⁴ By amendment filed February 17, 2004, petitioner submitted a statement of willingness to assume financial responsibility for the management of, for any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for payment of any and all taxes that may be levied or assessed against the right-of-way, as required under 49 CFR 1152.29, and acknowledged that the use of the right-of-way for trail purposes is subject to future reactivation for rail service.

⁵ Under 49 U.S.C. 10905, the Board may prohibit the disposal of rail properties that are
(continued...)

decision (until August 17, 2004). If a trail use agreement is reached on a portion of the right-of-way, NSR must keep the remaining portion of the right-of-way intact for the remainder of the period for public use negotiations. Also, a public use condition is not imposed for the benefit of any one purchaser, but rather to provide an opportunity for any interested person to acquire the right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, NSR is not required to deal exclusively with petitioner, but may engage in negotiations with other interested persons.

As conditioned, this decision and notice will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is reopened.
2. The late-filed request for a NITU under 16 U.S.C. 1247(d) and a public use condition under 49 U.S.C. 10905 is accepted.
3. The notice of exemption served and published in the Federal Register on September 24, 2003, exempting the abandonment of the line described above is modified to the extent necessary to implement interim trail use/rail banking and to permit public use negotiations as set forth below.
4. Consistent with the public use and interim trail use/rail banking conditions imposed in this decision and notice, NSR may discontinue service, and salvage track and related materials. NSR shall otherwise keep intact the right-of-way underlying the tracks, including bridges, trestles, culverts, and tunnels, for a period of 180 days from the effective date of the abandonment exemption (until April 21, 2004), to enable any state or local government agency, or other interested person to negotiate the acquisition of the line for public use. If an interim trail use/rail banking agreement is executed before April 21, 2004, the public use condition will expire to the extent the trail use/rail banking agreement covers the same line.
5. If an interim trail use/rail banking agreement is reached, it must require the trail user to assume for the term of the agreement, full responsibility for management of, for any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify

⁵(...continued)
proposed for abandonment and are suitable for public purposes for a period of not more than 180 days after the effective date of the decision approving or exempting the abandonment.

the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against, the right-of-way.

6. Interim trail use/rail banking is subject to the future restoration of rail service and to the user's continuing to meet the financial obligations for the right-of-way.

7. If interim trail use is implemented, and subsequently the user intends to terminate trail use, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

8. If an agreement for interim trail use/rail banking is reached by August 17, 2004, interim trail use may be implemented. If no agreement is reached by that time, NSR may fully abandon the line.

9. This decision is effective on its service date.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams
Secretary